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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

Rapporteur: Mr. Igor Lukashuk

ANNEX 2

Report on the Long Term Programme of Work

1. During its almost 50 years of existence, the Commission has undertaken and completed numerous topics belonging to various fields of public international law. 1/ However, if one sets work completed either against international law in its generality or even against the list of topics raised at one time or another as possible topics for codification and progressive development of international law by the Commission 2/ it is clear that much remains to be done.

2. The present paper does not purport to offer a complete survey of possible topics (in particular, the suggestions for "possible future topics" reflect proposals at different times by some of its members). Indeed, some topics proposed in the paper have been taken up by other bodies. The report as a whole aims at:

1/ See General scheme, infra, for details.

2/ Ibid.

(a) Classifying some very general fields of public international law governed mainly by rules of customary international law;

(b) Enumerating, under each of these very general headings, various topics which, at some time or another, have been proposed by the Commission or by individual members as possible topics for the ILC (dates of initial proposal are shown below in square brackets);

(c) Adding some possible topics on which the Commission does not intend to take a firm position on their feasibility for future work;

(d) Indicating those which have already been completed in whole or in part; and

(e) Setting out a very general outline of the main legal problems raised by three of the possible future topics which, in the view of the Commission are appropriate for codification and progressive development. These topics are the following:

(i) Diplomatic protection (Addendum 1);

(ii) Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (Addendum 2);

(iii) Unilateral acts of States (Addendum 3).

These three topics have been indicated in bold-faced letters in the general scheme below.

3. The general scheme proposed below is an example of a general approach which, in the view of the Commission offers a way of integrating in a global review of the main fields of general public international law some possible topics for future studies. The Commission is fully aware of the fact that some of the topics mentioned fall within the scope of activities of other bodies; they are referred to for the purpose of illustrating the scope of international law. The Commission has no intention of overlapping with the competence of the institutions concerned.

4. If this approach seems fruitful to the Commission and to the Sixth Committee, it is suggested that further study could be made during the next session of the Commission of topics additional to those suggested in Addenda 1 to 3.

GENERAL SCHEME 3/

I. SOURCES OF INTERNATIONAL LAW

1. Topics already completed:

(a) Law of treaties:

(i) Vienna Convention on the Law of Treaties, 1969;

(ii) Vienna Convention on the Law of Treaties between States and international organizations or between two or more international organizations, 1986;

(iii) Draft articles on most-favoured nation clauses, 1978.

2. Topics under consideration by the Commission:

Reservations to treaties.

3. Possible future topics:

(a) Law of treaties:

Multilateral treaty-making process [1979];

(b) Law of unilateral acts [1971]:

(i) **Unilateral acts of States** (see general outline - **Addendum 3**);

(ii) Law applicable to resolutions of international organizations;

(iii) Control of validity of the resolutions of international organizations;

(c) Customary international law:

(i) Formation of customary rules;

(ii) Legal effects of customary rules;

(d) Jus cogens (and related concepts) [1992];

(e) Non-binding instruments.

II. SUBJECTS OF INTERNATIONAL LAW

1. Topics taken up but abandoned:

(i) Fundamental rights and duties of States [1949];

(ii) "Succession" of Governments [1949];

2. Possible future topics:

(a) Subjects of international law [1949];

(b) Statehood:

(i) Position of States in international law [1971];

(ii) Criteria for recognition [1949];

(iii) Independence and sovereignty of States [1962];

3/ This list is for illustrative purposes; neither the formulations nor the content commit the Commission in its future undertakings.

(c) Government:

(i) Recognition of Governments [1949];

(ii) Representative Governments.

III. SUCCESSION OF STATES AND OTHER LEGAL PERSONS

1. Topics already completed:

(a) Vienna Convention on State Succession with respect to Treaties, 1978;

(b) Vienna Convention on State Succession with respect to State Property, Archives and Debts, 1986.

2. Topics under consideration by the Commission:

Succession of States with respect to nationality.

3. Possible future topics:

(a) Succession of States in respect of membership of, and obligations towards, international organizations;

(b) "Acquired rights" in relation with State succession;

(c) Succession of international organizations.

IV. STATE JURISDICTION/IMMUNITY FROM JURISDICTION

1. Topics already completed:

Jurisdictional immunities of States and their property, 1991.

2. Possible future topics:

(a) Immunities from execution;

(b) Extraterritorial jurisdiction:

(i) Recognition of acts of foreign States [1949];

(ii) Jurisdiction over foreign States [1949];

(iii) Jurisdiction with respect to crimes committed outside national territory [1949];

(iv) Extraterritorial application of national legislation [1992];

(c) Territorial jurisdiction:

Territorial domain of States [1949];

(d) Jurisdiction relating to public services ("compétences relatives aux services publics").

V. LAW OF INTERNATIONAL ORGANIZATIONS

1. Topics already completed:

Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character, 1975.

2. Topics taken up but not continued:

Status, privileges and immunities of international organizations, their officials, experts, etc.

3. Possible future topics:

(a) General principles of law of the international civil service;

(b) International legal personality of international organizations;

(c) Jurisdiction of international organizations:

(i) Implied powers;

(ii) Personal jurisdiction;

(iii) Territorial jurisdiction.

VI. POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW

1. Topics already completed:

Convention on the Reduction of Statelessness, 1961.

2. Possible future topics:

(a) International law relating to individuals [1971]:

The individual in international law;

(b) Treatment of aliens [1949]:

(i) Right of asylum [1949];

(ii) Extradition [1949];

(c) Law concerning international migrations [1992];

(d) Human rights and defence of democracy [1962].

VII. INTERNATIONAL CRIMINAL LAW

1. Topics already completed:

(a) Draft Statute for an International Criminal Court, 1994;

(b) Code of Crimes against the Peace and Security of Mankind, 1996.

2. Possible future topics:

(a) The principle "Aut dedere aut judicare";

(b) International crimes other than those referred to in the Code of Crimes against the peace and security of mankind.

VIII. LAW OF INTERNATIONAL SPACES

1. Topics already completed:

(a) Law of the sea:

Four Geneva Conventions, 1958.

(b) Legal regime of international rivers:

Draft Articles on the Law of Non-Navigational Uses of International Watercourses, 1994.

2. Topics taken up and abandoned:

Juridical regime of historical waters, 1962.

3. Possible future topics:

(a) Law of the sea:

Ownership and protection of wrecks beyond the limits of national maritime jurisdiction (see general outline - **Addendum 2**);

(b) Legal regime of international rivers and related topics:

Navigation on international rivers;

(c) Law of the air [1971];

(d) Law of space [1962];

(e) Shared natural resources:

(i) Global commons [1992];

(ii) The common heritage of mankind;

(iii) Transboundary resources;

(iv) The law of continued international groundwaters;

(v) Common interest of mankind.

IX. LAW OF INTERNATIONAL RELATIONS/RESPONSIBILITY

1. Topics already completed:

(a) Diplomatic and consular relations:

(i) Vienna Convention on Diplomatic Relations, 1961;

(ii) Vienna Convention on Consular Relations, 1963;

(iii) Vienna Convention on Special Missions, 1969;

(iv) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973;

(v) Status of the Diplomatic Courier and the Diplomatic Bag not accompanied by Diplomatic Courier, 1989.

2. Topics under consideration by the Commission:

(a) State responsibility;

(b) International liability for injurious consequences of acts not prohibited by international law.

3. Possible future topics:

(a) International responsibility:

(i) **Diplomatic protection** (see general outline - **Addendum 1**);

(ii) International responsibility of international organizations;

(iii) Functional protection;

(b) International representation of international organizations.

X. LAW OF THE ENVIRONMENT

Possible future topics:

Law of the environment:

Rights and duties of States for the protection of the human environment [1992].

XI. LAW OF ECONOMIC RELATIONS

(i) Economic and trade relations [1971];

(ii) Legal conditions of capital investment and agreements pertaining thereto [1993];

(iii) International legal problems connected with privatization of State properties;

(iv) General legal principles applicable to assistance in development.

XII. LAW OF ARMED CONFLICTS/DISARMAMENT

Possible future topics:

(a) Legal mechanisms necessary for the registration of sales or other transfer of arms, weapons and military equipment between States [1992];

(b) General legal principles applicable to demilitarized and/or neutral zones;

(c) General legal principles applicable to armed sanctions under Chapter VII of the United Nations Charter.

XIII. SETTLEMENT OF DISPUTES

Topics already completed:

Model Rules on Arbitral Procedure, 1958.

Possible future topics:

(a) Pacific settlement of international disputes [1949];

(b) Model clauses for the settlement of disputes relating to application or interpretation of future codification conventions;

(c) Mediation and conciliation procedures through the organs of the United Nations.

Addendum 1

DIPLOMATIC PROTECTION

General Outline

In proposing this topic as suitable for future work by the Commission the Commission had not prepared any outline of the topic comparable to those published in A/CN.4/454 of 9 November 1993. At its forty-eighth session in 1996 the Planning Group decided that a brief outline might assist Governments in deciding whether to approve further work.

The outline which follows is, of course, provisional. The Special Rapporteur would be free to recommend changes, as would Governments in the Sixth Committee. However, the topic has the attraction that it would form a companion study to the Commission's work on State Responsibility. The study could follow the traditional pattern of articles and commentaries, but leave for future decision the question of its final form. The Commission does not see this particular study as necessarily leading to a Convention. It could well take the form of a guide which may be useful to Governments in handling international claims.

Short explanatory notes are added to some of the sections to explain why the matter has current interest.

1. The basis of, and rationale for, diplomatic protection

2. Persons claiming diplomatic protection

A. Natural persons

(i) Nationals: proof of nationality and "genuine link";

(ii) Dual and plural nationals: role of "effective nationality":

(a) As against Third States;

(b) As against one of the States of nationality;

Note

Where an individual claimant has two nationalities, it is normally accepted that the proper claimant State, as against a third State, is the State of his "effective" nationality. Nevertheless, there may be situations where the State of "effective" nationality is unable to afford protection and in which the State of his second nationality should claim. The situation is not dissimilar to the exceptional cases when the State of "genuine link" is unable to act. Even more problematic is the situation when a State of one of the claimant's nationalities claims against the State of his other nationality. This has caused controversy within the U.S./Iran Claims

Commission (see Case A.18) and that tribunal has had to consider the circumstances in which claims on behalf of dual nationals should, or should not, be permitted.

(iii) Individuals in service with the State (aliens serving in armed forces, vessels, embassies);

(iv) Stateless persons;

(v) Non-nationals forming a minority in a group of national claimants.

Note

Situations may arise (as with the shooting-down of an aircraft, or sinking of a vessel), when the passengers and individual claimants are largely of one nationality, but when a small minority are of a different nationality. The question then arises whether multiple claims (i.e. multiple claimant-States) must occur, or whether the single claimant State can claim in a representative capacity.

B. Juristic persons

(i) Corporations, associations, etc.;

(ii) Partnerships;

(iii) Insurers.

Note

The law regarding partnerships lacks clarity, especially when the partners are of different nationality and also when differences arise over whether the claim is a "partnership" claim, or an individual claim.

The law regarding insurers is even less developed. The destruction of, or damage to, property covered by insurance may often result in the real loss falling on the insurer. It is by no means clear that "subrogation" of claims is acceptable, so that the State of the nationality of the insurer becomes a proper claimant.

3. Protection of certain forms of State property, and individuals only incidentally

(a) Embassies;

(b) State-owned vessels, aircraft, spacecraft;

(c) Military bases.

Note

The Commission at this stage takes no firm position on whether protection of State property should be part of the proposed study. However, it believes that this aspect of the problem is deserving of some preliminary study. The

issues are not the same as the immunities attaching to such property. They relate more to the questions of the means of protection available to the State, prior to any formal presentation of a claim.

4. The preconditions for protection

(a) Forms of protection other than claims;

(b) The presentation of an international claim:

(i) The relevance of damage as an incidence of the claim;

(ii) Relationship between diplomatic protection by the State of nationality and the "functional" protection extended by an international organization towards its agents;

(iii) The rule of nationality of claims:

- genuine link and the requirement of "continuity";
- exceptions thereto;

(iv) The rule of exhaustion of local remedies:

- scope and meaning;
- judicial, administrative and discretionary remedies;
- obligations to exhaust appeals, reviews, etc.;

(v) The impact of alternative international remedies:

- rights of recourse to human rights bodies;
- international claims commissions.

Note

Where rights of recourse exist for the individual, are the more traditional forms of diplomatic protection suspended, or terminated? And are the findings of such bodies conclusive in relation to future diplomatic claims?

5. The mechanisms for diplomatic protection in the absence of diplomatic relations

6. The formal requirements of a claim to protection

(a) Evidentiary requirements - of nationality, of sufficiency of claim, etc.;

(b) Timeliness - effect of delay in absence of rules on prescription.

7. The conclusiveness of claims settlements

(a) Effect on individual claimants of a Claimant State's acceptance of an offer of settlement;

(b) Settlement via international claims commissions, arbitration, etc.;

(c) Lump-sum settlements and awards by national claims commissions;

(d) Effects on settlements of subsequent discovery of:

(i) Fraud;

(ii) New facts.

Addendum 2

OWNERSHIP AND PROTECTION OF WRECKS BEYOND THE LIMITS OF NATIONAL MARITIME JURISDICTION

General Outline

The Working Group is of the view that this topic which was already included among those published in A/CN.4/454 of 9 November 1993 is of special interest. Indeed this topic is well delimited, has never been studied before and is of a largely practical value. Moreover, it was felt that the study of this topic could be concluded in a relatively short time, thus presenting an additional advantage.

The following outline is provisional. The Commission and the Special Rapporteur will be free to refine it and to recommend changes.

Advances in the science and technology of underwater exploration have facilitated the discovery and recovery of wrecks and their cargoes.

Competing interests surrounding this topic include:

(a) Sport and leisure (the "amateur");

(b) Economic (valuable cargo);

(c) Governmental (security, national heritage, etc.);

(d) Scientific (marine scientific research).

1. Definition of a "wreck"

Note

The legal definition for the purpose of the law of salvage concentrates on the notion of a vessel "in peril", and the law of salvage presumes that there is an owner and that the salvor is entitled to a reward from the owner for effective salvage.

But there is considerable uncertainty over whether a "wreck" is subject to salvage, as being "in peril".

Of relevance to this issue are some United States federal cases, the 1910 Brussels Convention on the Law of the Salvage, the 1967 Protocol to the Brussels Convention and the 1989 International Maritime Organization's International Salvage Convention. (These Conventions do not resolve the question, but leave the matter to national law.)

2. Coastal State jurisdiction

(a) Power to remove wrecks in the interests of the safety of navigation;

(b) Jurisdiction to entertain salvage claims;

(c) Jurisdiction to "protect" the wreck and regulate access to the site of the wreck;

(d) Jurisdiction to entertain claims to ownership of the wreck and/or its cargo.

Note

In principle, the points made in (a) and (b) and (c) are limited to international and territorial waters.

But in relation to archaeological objects and objects of historical origin found at sea, the 1982 United Nations Convention on the Law of the Sea, article 303 (2) provides for additional jurisdiction in the contiguous zone.

The areas of the continental shelf/exclusive economic zone and the high seas beyond the limits of national jurisdiction remain subject to great uncertainty in this regard, and it is clear that the 1982 Convention has not established any comprehensive regime to cover wrecks.

Despite the efforts of some States to extend coastal State jurisdiction to cover wrecks of archaeological or historic interest within 200 miles, the majority opposed these attempts to extend coastal State jurisdiction to resources other than "natural" resources. But there is some State practice to support such a power, and the more limited duty of protection of archaeological and historic objects (article 303 (1)) of the 1982 United Nations Convention on the Law of the Sea certainly covers these areas.

As concerns the high seas beyond national jurisdiction, here too, there is no general regime, but there is in article 149 of the 1982 Convention a special provision dealing with archaeological and historic objects.

3. The issue of ownership or title

(a) Naval vessels, military aircraft and other State-owned vessels, operated for non-commercial purposes;

(b) Wrecks of archaeological or historical interest.

Note

Are there agreed criteria for determining whether ownership has been retained or abandoned, so that the property is res derelicta? What law provides these criteria?

Wrecks may lose a flag registration, and therefore nationality under the law of some States after a certain time has elapsed, and they are "de-registered": but this does not affect ownership.

Does the law of State succession adequately deal with problems of a State-owned vessel, where that State has disappeared?

Current practice suggests that there is a presumption against abandonment of title over naval or State-owned vessels, and that an explicit act of transfer or abandonment is required. The rationale for this view lies in part in the security implications of the vessel or aircraft falling into the possession of unauthorized persons, and in part in the desire to keep the wreck untouched as a "war grave".

The attempts to introduce a special regime for wrecks of archaeological or historical interests in the 1982 Convention failed, but the Convention does contain certain limited provisions, such as article 149 and article 303, paragraphs 1 and 3.

It is difficult to extract from those a general duty of protection, utilizing the State's legislative, administrative and judicial powers, beyond the contiguous zone. So, beyond this zone, the primary issue is: who protects such wrecks? And there are consequential issues relating to ownership and disposal of the wreck and its cargo. Certain States have argued for a latent right of ownership vested in the State whose cultural heritage the vessel belongs to.

Furthermore, there are a number of UNESCO conventions dealing with the Cultural Heritage. But none of these deal explicitly with wrecks, and the obligations imposed on States will presumably not apply beyond the territorial sea.

The Council of Europe has the 1985 European Convention on Offences relating to Cultural Property (likewise not extending beyond the territorial sea); and, more in point, there is a Draft Convention on the Underwater Heritage, drawn up after the Prott Report.

But there is little specific legislation apart from a few exceptions: (Australia: The Historic Shipwrecks Acts of 1976; United States of America: The R.M.S. Titanic Maritime Memorial Act of 1986, and the Abandoned Shipwrecks Act of 1987). Moreover, there are a few bilateral treaties such as an Agreement between Australia and The Netherlands which concerns Old Dutch Shipwrecks: and an Agreement between Australia and Papua New Guinea on the Delimitation of Maritime Boundaries, 1978.

4. Disposal of recovered vessels or objects found therein

Note

Assuming access to the site is lawful, the question arises of whether the "finder" acquires title, so various questions arise:

(a) Which Courts have jurisdiction to adjudicate disputes over title? (If coastal States were given this jurisdiction out to 200 miles, most cases would be covered. Most wrecks are found within this distance offshore, since, traditionally, the trade routes have followed the coasts and wrecks have occurred where weather or error has forced a vessel too close inshore.);

(b) Should certain States have prior, or preferential, rights to either prohibit sale, or purchase the wreck or contents?

Addendum 3

UNILATERAL ACTS OF STATES

General outline

One of the main achievements of the Commission has been the codification of the law of treaties which has resulted in the adoption of two major conventions, the Vienna Conventions on the Law of Treaties of 1969 and on the Law of Treaties between States and international organizations or between two or more international organizations of 1986, and which is now being continued by a study on reservations to treaties, which should, in principle, result in the adoption of guidelines offered to States and international organizations.

However, the law of treaties is far from exhausting the much more general topic of "Sources of international law" which was envisaged as a global topic of codification in the 1949 Study of the Secretariat. This is not a subject which in itself could even be completely codified: but it appears that some more precise topics are mature and could be fruitfully studied and be the object of draft articles.

Among the topics which have been proposed, the Working Group is of the opinion that "Unilateral Acts of States" would be a proper subject for immediate consideration:

- It is a rather well delimited topic which has been the subject of several important doctrinal works but has never yet been studied by any international official body;
- It has been touched upon by several judgements of the ICJ, and especially in the Nuclear Tests Cases, but the celebrated dicta leave room for uncertainties and questions;
- States have abundant recourse to unilateral acts and their practice can certainly be studied with a view to drawing general legal principles;
- Although the law of treaties and the law applicable to unilateral acts of States differ in many respects, the existing law of treaties certainly offers a helpful point of departure and a scheme by reference to which the rules relating to unilateral acts could be approached.

The following general outline is tentative and will need to be refined and further discussed prior to any positive adoption for study by the Commission.

1. Definition and Typology

(a) Definition

Distinction from:

(i) Unilateral non-binding instruments;

(ii) Treaties (possibility of "plurilateral acts" ("collective unilateral acts")?);

Note

It is of course a matter for further study whether these comparisons should be made at the beginning or after the definition.

(iii) The substantial criterion: the will to be bound;

(iv) Great variety of forms (cf. Nuclear Tests Case); possibility of verbal unilateral acts (cf. Eastern Greenland); silence?

Note

The question of whether or not silence amounts to a unilateral act is a difficult one. The Commission may wish to decide at an early stage whether it intends to include it in its study.

(v) Submission to international law;

(vi) The author - attribution to the State:

- Irrelevance of the State organ's functions (executive or legislative; the judiciary?);
- Necessity of a capacity to bind the State internationally;
- Problems relating to the State's dismemberment and succession to unilateral acts.

Note

Very probably the law of treaties offers useful guidelines in regard to this last question; this, however, does not mean that the rules relating to capacity in the law of treaties can be simply transposed to unilateral acts.

(b) Typology

(i) "bilateral" (addressed to another determined State); "plurilateral" (addressed to the entire international community);

(ii) "autonomous" acts (notification, recognition, acquiescence, protest, renunciation, promise ...) connected with treaties (e.g., Optional declarations under Art. 36 (2) of the ICJ Statute, notifications in accordance with a treaty clause).

Note

Here again, the very rough typology proposed must be taken with caution; it is included here more in order to offer examples and to show the complexity of the problems raised by the topic than to propose any kind of definitive classification. Moreover, it is likely that the principles in sections 2 to 4 below might not apply uniformly to all the different kinds of unilateral acts and should be differentiated.

2. Legal effects and application

(a) Binding nature of unilateral acts for the "author State"

(i) The "Nuclear Tests" principle;

(ii) Legal consequences:

. Bona fide application ("Acta sunt servanda");

. Creation of rights for other States ("Acta tertiis prosunt");

. Conditions to which invocation of unilateral acts by other States are submitted.

Note

These conditions are different from the "conditions of validity" under section 3 below; here the problem is to determine WHEN a State (and WHICH State - or other subject of international law) may invoke a unilateral act.

(b) Non-opposability to other States

(i) The principle: a State cannot impose duties on other States ("Acta tertiis non nocent");

(ii) Exceptions;

(iii) Formal or implied acceptance by the "addressee State[s]";

(iv) Unilateral acts adopted in application of general rules of international law.

Note

An example of the latter could be the unilateral delimitation of the territorial sea or the exclusive economic zone when there exists no other neighbouring coastal State.

(c) Interpretation

Note

Here again, see the rules in the Vienna Convention on the Law of Treaties; but, as the Court has declared, the transposition cannot be made without caution.

3. Conditions of validity

(a) Defects in the expression of will by the State

(i) Defects in the legal capacity of the organ author of the act;

(ii) Error;

(iii) Defects in relation to the behaviour of the "addressee State[s]":

. Fraud?

. Corruption;

. Duress on the State author of the act;

(iv) Acts contradicting a peremptory norm of general international law (jus cogens).

Note

The Law of Treaties offers an indispensable point of departure but can probably not be transposed purely and simply.

(b) Legal consequences of defects in the expression of will

(i) Procedure in case of defects in the expression of will by the State;

(ii) Nullity of the act and its consequences (variety of consequences depending on the type of the defect and, probably, on the type of the act itself).

4. Duration, Amendment and Termination

Note

This is certainly the most important problem in practice and the real core of the whole study lies here: nobody can seriously doubt that a State is bound by its unilateral acts (see the ICJ's judgements in the Nuclear Tests cases; but it would be absurd to pose as a principle that a State can never retract from its expression of will. However, the international jurisprudence seems to be of very little help in this regard and the Commission will probably have to undertake progressive development.

(a) Termination or amendment by the "author State"

(i) Express or implied limited duration;

(ii) General limitation on the right of the State author of the act to terminate or amend its act;

(b) Termination or amendment because of external circumstances

(i) Fundamental change of circumstances;

(ii) Impossibility of application;

(iii) Armed conflict?

(iv) Succession of States?